No. 979.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a corporation),

Plaintiff in Error,

vs.

NOME BEACH LITERAGE & TRANSPORTATION COMPANY (a corporation),

Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

NATHAN H. FRANK,
Attorney for Defendant in Error.

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It will be remembered that under the first heading in our brief (pp. 17-38) we made the point that the instructions of the Court there under consideration were sustained by the fact that the under deck cargo was an *actual* total loss, and even if it had not been an actual total loss, the evidence was still sufficient to warrant the instruction because it would at least warrant a finding of a *constructive* total loss.

This latter position is now assailed by appellant. In the first place, he shows great concern about the *theory* upon which *he* alleges the *respondent* tried the case in the lower court, and with an interesting assurance asserts that when the complaint was drawn the pleader never had in mind a constructive total loss, and that such a theory never was suggested until our brief on appeal was written. Now, if this were true, and we shall presently indicate why it is not, we do not think this Court is at all concerned with the fact. The only question to be determined is, can the instruction of the Court be sustained under the law. What ever theories counsel may have, the Court gives its instructions upon its own theory of the law, often rejecting the theories of both counsel as embodied in their proposed instructions.

But we are not at fault if, as is often the case, appellant was so blindly wedded to one idea as to be unable to comprehend the full scope of his case. When he says that the theory of a constructive total loss was never suggested until our brief was written, he ignores the indisputable evidence to the contrary, viz, our proof, made at the trial, *of an abandonment*. Trans. pp. 63, 64. It is true, appellant says "this evidence did not establish an abandonment" (Reply Brief p. 10), but whether it did or not, it is conclusive of the fact that respondent, conceived *before suit brought* and developed *at the trial*, the theory that he could and would fortify himself with the double claim of a constructive as well as an actual total loss—before suit brought by making the abandonment, at the trial by proving it.

But, says, appellant, the facts of the case do not bring it within the provisions of section 2717 C. C. permitting an abandonment, and if it did, there is no *proof* of an abandonment. On both these contentions he is driven into a very narrow corner. We are perfectly content to rest the question, as to whether or not the facts, as set out in our brief (pp. 26-38), are such as would warrant an abandonment under Sec. 2717 C. C. As to the *proof* of the abandonment, we said (p. 30) "In the case at bar the "abandonment to the insurance company is conceded." Now appellant says there is no such concession and no proof. But does he sincerely believe that he can in that way dispose of the testimony of Mr. Davis, General Manager of the company, who when asked "Did this company "subsequently make an abandonment of this cargo to "you?" and is shown a paper, replies, "I do not know "whether that is the paper or not, *but you served an "abandonment on us*, which was returned and not ac- "cepted"?

It is said it does not appear the paper referred to, either in form or substance met the requirements of the Code, and that its rejection might have been for that reason. The conclusive reply is that if it was rejected for any such reason, it lay with the insurance company to prove it. The statement of the witness that an abandonment *was* served, carries with it an implication that it was in due form, sufficient to make a *prima facie* case, and the burden is on the insurer to show it was not. The fact that it was not accepted, can not avail appellant, for an acceptance is not necessary to our rights (*C. C.* §2727) and the refusal does not affect them (*C. C.* §2731). Be-

sides the witness further said that he thought the claim was just and should be paid, thus indicating that the rejection was a mere formality.

But, it is further to be observed, that the provisions of the Code respecting abandonment to which appellant refers, are but a reiteration of the common law upon the subject, and that the Code also provides that an "abandonment" is made by giving notice thereof to the insurer, which "may be done *orally*, or in writing" (§2721).

This in itself, indicates that there is no stringent formality required. And so the authorities indicate. Mr. Joyce says:

> "We deduce from an examination of the cases that the question rests upon the *intention and understanding* of the parties with respect to an abandonment. The true rule seems to be this, that if it clearly appears from the facts, circumstances, grounds, and reasons upon which the assured proceeds, and from the character and terms of the demand or claim, that assured clearly intends to abandon, and such intention is so evident that it must have been so understood *or if so understood by the assurers, the claim for a total loss will imply an abandonment, even though it is not formally and in terms expressed*" 4 Joyce, p. 2919.

In this the author is supported by the Circuit Court of Appeals, Sixth Circuit, (*Ins. Co. v. Johnson*, 70 Fed. *796*), where it was not only said that

> "All that is necessary is that the intention to abandon shall be made clear enough fully to advise the underwriter that the vessel is turned over to him for the purpose",

but it was further held that even if the abandonment was objectionable because of the indefiniteness of a reservation

of title therein contained, the *rejection having been absolute*, it was a waiver of the objection as to form. We do not overlook the additional fact in that case, that the abandonment contained "an invitation to object to "the form of abandonment if unsatisfactory", but we do not think that material so far as concerns the legal principal upon which the ruling is based. That principle is akin to the one urged on pp. 74, 75 of our original brief, viz: that a general objection is a waiver of specific defects in proofs of loss. (See cases cited in *Ins. Co. v. Johnson* above).

In the case at bar, the language of the witness leaves no doubt, but that *he* understood that it was the intention of assured to abandon, and hence we deem the evidence sufficient.

II.

We desire further to call attention to one or two comments by appellant upon the cases cited by us. We deem the *principles* laid down in *Monroe v. Br. & For. Ins. Co.* as applied to the *particular facts of this case*, as conclusive in our favor of the propriety of the instructions complained of. It is, however, said that the *Monroe* case holds "that testimony that the salvors refused to give up "the salved cargo is too general to constitute proof that "due diligence was used", brief pp. 7 and 8.

Perhaps so, but it seems incredible that appellant sees no more in this record than, as in the *Monroe* case, the bare statement of one witness "unsupported by detail". On

pages 6 to 10 both inclusive of our original brief we have attempted to outline some of the facts pertinent to this question. In the same connection appellant says: "It " is also pointed out in that case that where a part of " the cargo arrives at its destination a total loss cannot " be claimed". But is that so? The language of the court is as follows: "As part of the cattle arrived at Berken- " head, an absolute total loss cannot be made out, *unless* " as already said, the plaintiff shows that the underwrit- " ers directed an unauthorized sale, *or that, with due* " *diligence, he could not have discharged the claim of the* " *salvors,* and thus secured the remnants of the consign- " ment. On important elements making essential parts of " *this* proposition, he has *failed to furnish any proofs;* " and on that account", etc.

In passing let us also notice among other expressions the following, showing a marked difference in the facts of the two cases. The court says: "The further proposition, " that the sale was a legal *or physical necessity,* is also in- " effectual; because, the record fails to show that there " was not sufficient time and opportunity to discharge the " lien of the salvors, and take possession of the cattle, " *before the time of any necessary sale could arrive.* " In this respect the conditions were essentially unlike " those which appeared in *Boudrett v. Hentigg,* Holt, " N. P. 149, where the goods were stolen on a barbarous " coast; *for, in the cases at bar the courts and laws were* " *in the same full vigor when the property arrived* as " in the United States; and presumably *the consignees* " *had opportunity for enforcing all legal rights*" pp. 790-91.

It is scarcely necessary to point out to this court, that in the present case the record shows that the vessel was lying in a dangerous position, that there were no courts and laws in vigor save the one to which the parties appealed, and who decided in favor of the salvors—Capt. Tuttle—let alone the unfortunate illness of their agent, loss of his funds, and absolute lack of means of raising money, in what was then, to all intents and purposes "a barbarous coast".

In considering the *Monroe* case, it must not be forgotten, that the policy there considered was against *absolute total loss only* (p. 778). Hence it is inapplicable to the questions we raise in our case of a constructive total loss.

Appellant also attempts to distinguish the *Boudrett* case by the suggestion that there the goods were "wrecked " upon a *foreign* shore and were destroyed by the *foreign* " inhabitants resident there" while "In the case at bar " the goods were not wrecked upon a foreign shore and " were not destroyed. They remained on board the ship " and while thereon *were towed to the port of destination* " *and arrived in specie*". But appellant has overlooked the fact that in the *Boudrett* case the "foreign shore" upon which he lays such stress was also *the port of destination*, and that some of the goods *were saved there and got on shore*, and were afterwards plundered by the natives. Hence, part of them also "arrived in specie".

Neither do we concede that in the case at bar the cargo arrived in specie at the port of destination, within the meaning of that term as applied to the insurance contract, for as already pointed out, the insurance did not cease on

dropping anchor as in the ordinary insurance between named ports, but ran "until 30 days after arrival at port " of destination", and before that time had expired, the whole transaction had culminated.

We deem it unnecessary to refer to the other matters touched on in the reply of appellant, because we feel that they are amply treated in our original brief.

Respectfully submitted,

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